

# Morgan Lewis

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February 8, 2019

**Via ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Room TW-A325  
Washington, DC 20554

**Re: NOTICE OF EX PARTE COMMUNICATION  
CG Docket Nos. 13-24, 03-123  
PS Docket Nos. 18-261, 17-239**

Dear Ms. Dortch:

On February 7, 2019, Michael Strecker, Vice President of Regulatory and Strategic Policy of ClearCaptions, LLC ("ClearCaptions"), along with its undersigned counsel, met separately with Michael Carowitz, Special Counsel to Chairman Pai and Robert Aldrich, Legal Advisor for Consumer and Governmental Affairs Bureau; Arielle Roth, Wireline Legal Advisor to Commissioner O'Rielly; Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Rosenworcel; Jamie Susskind, Chief of Staff to Commissioner Carr; and Randy Clarke, Acting Wireline Legal Advisor to Commissioner Starks, as well as a meeting with Commission Staff Robert Aldrich, Legal Advisor for Consumer and Governmental Affairs Bureau; Eliot Greenwald, Deputy Chief of Disabilities Rights Division ("DRO"); Michael Scott, DRO attorney; and David Schmidt, TRS Fund Program Administrator, Office of Managing Director to discuss the draft Report and Order, Further Notice of Proposed Rulemaking, and Order ("*Draft R&O, FNPRM, and Order*").<sup>1</sup>

During the meetings, ClearCaptions supported the proposed temporary waiver of certain emergency call-handling rules for Internet Protocol Captioned Telephone Service ("IP CTS").

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<sup>1</sup> See *In the Matter of Misuse of Internet Protocol (IP) Captioned Telephone Service and Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Further Notice of Proposed Rulemaking, and Order, CG Docket Nos. 13-24 & 03-123, FCC-CIRC1901-04 (circulated Jan. 3, 2019) ("*Draft R&O, FNPRM, and Order*").

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Granting the waiver is consistent with Commission precedent<sup>2</sup> and will enable ClearCaptions to offer its customers a mobile application for IP CTS. ClearCaptions also supported the Commission's plan to initiate a rulemaking to amend emergency call-handling rules for IP CTS providers to tailor such rules to the call flow of IP CTS, as opposed to Video Relay or Internet Protocol Relay, service and better protect public safety.

ClearCaptions recommended that the Commission amend the *Draft R&O* to find that the incremental costs of implementing the TRS User Registration Database ("TRS-URD") are recoverable exogenous costs. The Commission set IP CTS rates through June 30, 2020 based on IP CTS providers' historical costs,<sup>3</sup> which did not include costs for any new TRS-URD requirements that may be adopted in this order. Reasonable incremental costs associated with integrating ClearCaptions' existing database and customer management systems with the TRS-URD and costs associated with submitting user registration data to the TRS-URD are expected to be significant and will disproportionately impact the smallest IP CTS providers. Although the three paragraphs in the 2013 FNPRM that discussed centralized registration and verification of IP CTS users did not seek comment on the estimated costs of implementing this new requirement, in 2018 the Commission asked about recovery of exogenous costs associated with implementing the TRS-URD.<sup>4</sup> ClearCaptions argued then that it would incur exogenous costs that should be recoverable.<sup>5</sup> During the meetings, ClearCaptions clarified that if the Company is able to absorb the costs of complying with any new TRS-URD obligations via its normal cash flows, it would expect to ask only for direct reimbursement of those costs. Although ClearCaptions does not expect the new compliance costs to be so significant that it would be required to obtain additional financing, in the event new financing were required, ClearCaptions recommended that some type of mark-up be included in the reimbursement.

Permitting providers to recover exogenous costs incurred to comply with new TRS-URD regulatory obligations would be consistent with the Commission's permitted recovery of

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<sup>2</sup> *Review of Mezmo Corporation d/b/a InnoCaption, Motion to Lift Suspension of Conditional Certification*, Order, CG Docket Nos. 03-123, 13-24, and 10-51, 31 FCC Rcd. 7023, 7028-31, ¶¶ 14-22 (Consumer and Govt. Affairs Bur. 2016).

<sup>3</sup> *Misuse of Internet Protocol (IP) Captioned Telephone Service, Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order, Declaratory Ruling, Further Notice of Proposed Rulemaking, and Notice of Inquiry, 33 FCC Rcd. 5800, 5822, ¶ 36 (June 8, 2018) (*2018 IP CTS Reform R&O, DR, FNPRM & NOI*). ([W]e have sufficient information to determine interim rates through June 30, 2020, based on provider cost data collected by the TRS Fund administrator over the past several years").

<sup>4</sup> *2018 IP CTS Reform R&O, DR, FNPRM & NOI*, 33 FCC Rcd. at 5845, ¶ 93. ("Specifically, should IP CTS providers be permitted to seek compensation for well-documented exogenous costs that (1) belong to a category of costs that the Commission has deemed allowable, (2) result from new TRS requirements or other causes beyond the provider's control, (3) are new costs that were not factored into the applicable compensation rates, and (4) if unrecovered, would cause a provider's current allowable-expenses-plus-operating margin to exceed its IP CTS revenues.").

<sup>5</sup> Initial Comments of ClearCaptions, LLC, CG Docket Nos. 13-24 and 03-123, at 19 (Sept. 17, 2018) (Ongoing exogenous costs include costs such as... costs associated with adopting the TRS User Registration Database in the context of IP CTS.).

numbering costs, for example. In 2008, the Commission found that “because we now require Internet-based TRS providers to offer ten-digit numbering and E911 services, providers of these services are entitled to recover their reasonable costs of complying with the new requirements...”<sup>6</sup> ClearCaptions therefore recommends that the Commission remove footnote 63 from the *Draft R&O* and revise paragraphs 21 and 22 to make clear that IP CTS providers should be reimbursed for any exogenous costs associated with implementing the TRS-URD requirements adopted in the Order. ClearCaptions suggests replacement language in Appendix A, which is modeled on paragraphs 98-100 of the TRS Numbering Order.

ClearCaptions also asked the Commission to clarify that providers must obtain consent only for subscriber-provided data to be submitted to the TRS-URD. The current *Draft R&O* requires providers to notify consumers of “their data” that will be submitted to the TRS-URD, including the unique identifier assigned by the IP CTS provider. In contrast, the 2013 VRS Order required consent to provide the TRS-URD “subscriber information” to the TRS-URD. ClearCaptions believes that in both cases, the Commission’s intent is for subscribers to consent to transmission to the TRS-URD of the subscriber’s personally identifiable information, such as the last four digits of the user’s social security number and date of birth. ClearCaptions is concerned that asking users to consent to transmission of all eleven items of data required by the rules, most of which are not personally identifiable information, would cause customer confusion. In Appendix B, ClearCaptions suggests clarifying language modeled in part on the language used in the 2013 VRS Order.<sup>7</sup>

Finally, ClearCaptions asked the Commission to continue internal coordination between this item and the Public Safety Notice, which is also seeking comment on 911 rules that could be applied to IP CTS providers.<sup>8</sup> ClearCaptions explained that its reply comments in the Public Safety docket will ask the Commission to incorporate any waiver or rule changes adopted in this docket, amend the proposed rule regarding dispatchable location to provide the flexibility discussed in the body of the Public Safety Notice, and ask the FCC to consider alternatives for IP CTS providers to obtain dispatchable location, such as through a location override limited to when IP CTS subscribers place 911 calls.

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<sup>6</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, CG Docket No. 03-123; E911 Requirements for IP-Enabled Service Providers, WC Docket No. 05-196, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 11591, 11626 ¶ 96 (2008) (TRS Numbering Order).

<sup>7</sup> *Structure and Practices of the Video Relay Service Program; Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 8618, 8650-51, ¶ 70.

<sup>8</sup> Public Safety and Homeland Security Bureau Announces Comment and Reply Comment Dates for the Notice of Proposed Rulemaking Implementing Kari’s Law and Section 506 of RAY BAUM’S Act, Public Notice, DA 18-1102 (rel. Oct. 26, 2018).

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Please contact the undersigned if you have any questions.

Respectfully submitted,

*/s/ Tamar Finn*

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cc: Via E-Mail

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## **APPENDIX A – Suggested Replacement Language for Paragraphs 21-22**

Although we do not believe that the providers' additional costs necessary to implement the TRS-URD requirements adopted herein will be substantial, they are costs for which the providers generally may be reimbursed. These costs, of course, have not been factored into the present compensation rates, but reflect new costs related to new service requirements. Although we could adjust the current IP CTS rates to include these additional costs, we conclude that because the amount of these costs is presently uncertain, and may vary among the providers, we will compensate these costs separately from the other costs presently encompassed by the per-minute compensation rates.

Therefore, providers seeking compensation for their actual reasonable costs of complying with the new requirements adopted in this item must submit to the Interstate TRS Fund Administrator a reasonably detailed explanation of those costs incurred. We will require that such costs be submitted every three months, beginning three months after the release date of this Order. Costs submitted must be for those costs actually incurred during the prior three-month period. The TRS Fund Administrator, and the Commission, shall review submitted costs and may request supporting documentation to verify the expenses claimed, and may also disallow unreasonable costs. We will permit such filings until such time as new compensation rates are adopted that include the costs of complying with the requirements adopted herein, or the Commission otherwise re-addresses this issue.

Submitted costs may include those additional costs incurred by a provider that directly relate to: (1) ensuring that database information is properly and timely transmitted and accepted by the TRS-URD; and (2) other implementation related tasks directly related to facilitating user registration in the TRS-URD.

## **APPENDIX B – Suggested Clarification for Subscriber Consent**

18. *Data Privacy.* We conclude that the same privacy safeguards that currently protect Database data on VRS users also will be sufficient to protect the privacy of IP CTS users.... VRS providers must obtain users' prior consent to transmit their ~~data~~ subscriber's information to the Database, after notifying them of the data to be submitted, the reason for disclosure, and the consequences of nondisclosure. Prior to providing subscriber information to the database, the IP CTS provider must obtain consent from the subscriber. In doing so, the IP CTS provider must describe to the subscriber in writing using clear and easily understandable language the specific personal information being submitted, that the information is being provided to the TRS-URD to ensure the proper administration of the TRS program, and that failure to provide consent will result in the registered user being denied service. IP CTS providers must obtain and keep a record of affirmative acknowledgment by every registered user of such consent.